INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Brinegar v. *United States*, 338 U. S. 160	5
Johnson v. *United States*, 333 U. S. 10	6, 7
United States v. *Di Re*, 332 U. S. 581	6

Statutes:

22 D. C. Code (1940 ed.):

§ 1501	2
§ 1502	2

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 465

BERNARD NEWYAHR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 16-16A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1949 (R. 17). The petition for a writ of certiorari was filed on November 25, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether there was probable cause to arrest and search petitioner without a warrant, where a police officer had made a numbers game "play" with petitioner's wife, after which petitioner had conversations with his wife and the officer indicating that he was probably involved in the illegal numbers game.

STATUTES INVOLVED

22 D.C. Code (1940 ed.) § 1501:

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery * * * he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. * * *

22 D. C. Code (1940 ed.) § 1502:

> If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

STATEMENT

Petitioner and his wife, Louise C. Newyahr, and Hyman Sussman were indicted in four counts for

violations of 22 D. C. Code (1940 ed.) §§ 1501 and 1502 (R. 2-3). After trial before the court without a jury, petitioner was convicted on the first count (R. 2), which charged that the defendants "were concerned as owners, agents and clerks, and in other ways, in managing, carrying on, promoting and advertising a lottery known as the numbers game" (R. 2-3). Petitioner was sentenced to imprisonment for a term of six to eighteen months (R. 4).

The evidence showed that the police had been informed that a numbers game was being conducted at the cafe where the defendants were later arrested. A police officer, Samuel E. Wallace, went to the cafe in plain clothes on September 8 and 9, 1948. On September 9, while seated on a stool at the bar, he saw Louise Newyahr and Sussman seated facing each other in a booth about 15 feet away. (R. 5-7.) He saw "three or four other fellows go over to her [Mrs. Newyahr], and make plays with her, what I presumed to be plays." He then wrote a note—"Louise, put 25 cents on 962 for me, Sam"—wrapped a marked 25-cent piece in it, and took it to Mrs. Newyahr, who accepted the money and took "some pad out of her purse." Shortly after Wallace returned to the bar, petitioner, whom Wallace noticed for the first time, went to his wife's table and talked to her for several minutes. (R. 7.) Then petitioner walked over to Wallace, asked him a number of different questions, who Sam was, and where he worked. To di-

vert suspicion, Wallace asked petitioner if he was "a cop, and why he didn't lay off." Petitioner answered in the negative and left Wallace. (R. 7-8.) Shortly thereafter, detectives Roche, McEwen, and Greco entered the cafe (R. 8). When Roche arrested Louise Newyahr and Sussman, they dropped on the floor a package of papers, one of which contained the entry, "962, 25" (R. 9, 11-12). Wallace testified that he knew petitioner "had something to do about it" and did not want him "to get away" and that he therefore signaled Roche to arrest petitioner (R. 9; see also R. 14). Roche told petitioner to go to the front of the cafe, where Greco took him into custody (R. 14-15). Petitioner was searched at police headquarters and the officers found on him the marked quarter Wallace had given Louise Newyahr (R. 11, 13, 15). Petitioner remarked at that time that "he would take the rap for his wife" (R. 13).

A pre-trial motion to suppress the marked quarter as evidence (R. 3-4) was denied and at the trial the court again overruled an objection to its introduction (R. 13).

ARGUMENT

Petitioner's sole contention is that his arrest, the legality of which is determinative of the validity of the search of his person, was illegal because the arresting officers had no probable cause to believe him guilty of a felony.

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge

and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162." *Brinegar* v. *United States,* 338 U. S. 160, 175-176.

We believe the Court of Appeals was clearly right in holding that the facts known to officer Wallace were "ample" to warrant his belief that petitioner was participating in the felony of conducting a numbers game (R. 16A). Wallace had been sent to the cafe to investigate a complaint that someone was writing numbers there. He had personal knowledge that petitioner's wife was accepting bets on numbers, for he saw three or four other persons place what appeared to be "plays" with her and also made one himself (R. 7). A felony was being committed in his presence. He also had personal knowledge of facts which reasonably gave rise to the inference that petitioner was participating with his wife in the illegal enterprise. Shortly after Wallace made his play, petitioner spoke to his wife for several minutes and then walked over to where Wallace was seated and asked him a number of questions seeking to learn his identity, specifically asking about "Sam", the name Wallace had signed on his note to petitioner's wife. The obvious inference to be drawn from petitioner's conduct is that his wife had spoken to him about Wallace's play and he was trying to learn whether there was any basis for suspecting Wal-

lace, making necessary precautionary measures to avoid police detection. Otherwise there would have been no plausible reason for petitioner to question Wallace. As the Court of Appeals said in upholding the legality of the arrest and search (R. 16A), "Such guarded information, so quickly in appellant's possession, and his peculiar conduct concerning the same, sufficed to create a reasonable inference and belief that he had an unusual interest and concern in what Louise was doing. It is strong support for Wallace's testimony that he did not want appellant to get away; he knew 'he had something to do about it.' "

Petitioner relies upon *United States* v. *Di Re,* 332 U. S. 581, but that case is readily distinguishable. The basis of the decision that the arrest and search of Di Re were illegal was that his mere presence in a car with a person reasonably suspected on prior information and the observations of the officers of having committed a crime gave rise to no probable cause for his arrest (332 U. S. at 592-594). Here there was much more than mere presence. Petitioner's actions showed that he knew Wallace had made a "play" and that he was vitally concerned with his wife in knowing the identity of the persons from whom she accepted "plays".

Neither does *Johnson* v. *United States,* 333 U. S. 10, support petitioner's contention. In that case the arrest was made after the officers had entered the defendant's hotel room without a search warrant

"under color of their police authority." Although the officers had reason to believe that a crime was being committed inside the room, this Court held that they had no probable cause to arrest the defendant until they identified her as the sole occupant and that an arrest following such an unauthorized intrusion is unlawful (333 U. S. at 15-17). In this case, on the other hand, the crime was openly being committed in a public place which the officers had a right to enter and Wallace's personal observations of the defendant's actions furnished ample probable cause for the arrests.

CONCLUSION

This case involves only the application of settled principles established by this Court to the particular facts here presented. The court below correctly applied those principles, and there is no occasion for further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
ROBERT G. MAYSACK,
Attorneys.

DECEMBER 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 867321 380